Supreme Court, U. S.
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78-1240

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

STAMM F. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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February 6, 1979

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No._____

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Stamm F. Johnson prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered October 17, 1978, which affirmed the judgment of the United States District Court for the District of Oregon. United States v. Johnson, 424 F.Supp. 631 (D.Or. 1976).

OPINION BELOW

The opinion of the Court of Appeals

is not officially reported. It is attached as Appendix A, infra.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

Was a seizure of personal property under 26 U.S.C. § 6331 illegal where the agents effecting seizure entered the taxpayer's offices, inventoried the property, excluded taxpayer's employees, and locked the building (not subject to seizure), knowing that permanent destruction of the business could ensue, without exigent circumstances and without a warrant or other prior determination by a responsible official of the necessity and probable grounds for seizure, or for a seizure of such an extent and effected in such a manner?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution in pertinent part provides:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

26 U.S.C. § 6331 provides, in pertinent part:

> "(a) Authority of Secretary or delegate.--If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.
>
> * * *
>
> "(b) Seizure and sale of pro-

perty.--The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * *"

26 U.S.C. § 7212(b) provides:

"(b) Forcible rescue of seized property.--Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined not more than $500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years."

STATEMENT OF THE CASE

Petitioner Stamm F. Johnson was convicted of rescuing property which had been seized by the United States Internal Revenue Service pursuant to a tax lien, in violation of 26 U.S.C. § 7212(b). The case was tried to the Court on stipulated facts

and oral testimony. The District Court opinion, reported at 424 F.Supp. 631 (D.Or. 1976), provides a succinct statement of most of the relevant facts:

"The defendant is a member of the Oregon State Bar. He specializes in the area of creditors' remedies and is active in the Oregon State Bar Committee on Debtor-Creditor Rights. He participated in the drafting of Oregon legislation on creditors' rights and civil procedure. I am satisfied that Mr. Johnson committed the acts in issue in good faith and for the sole purpose of testing the validity of IRS summary seizure powers.

* * *

The following facts led up to the indictment. In 1975 Mr. Johnson and his wife were the sole shareholders of National Credit Bureau, Inc. ("NCB"), a Portland collection agency. While a director and officer of the corporation, Mr. Johnson did not take active part in the day-to-day management of the business.

On April 4, 1975, because of unpaid taxes owed by the corporation, agents of the IRS levied upon business equipment, including desks and typewriters located at the NCB office. The agents accomplished this levy or seizure by installing locks on the office entrances and by attaching warning notices to the windows. No tags or warnings were

> attached to the individual items of personal property inside the office. The agents did not intend to seize the real estate.
>
> Mr. Johnson learned of the levy late in the afternoon of April 4, a Friday. The next day he went to the NCB office and observed the warning notice and locks. He proceeded to remove the locks, gain entrance to the premises, and remove the notices. He had a locksmith install new locks on the building. About ten days later NCB's tax arrearage was paid in full, and the IRS formally released its levy." United States v. Johnson, 424 F.Supp. at 631-632 (footnote omitted).

In effecting a seizure of the personal property, Internal Revenue agents entered the NCB offices, inventoried property there, and expelled NCB employees who were at work there, prior to locking the premises. (R. 21-24; C.T. 18-19.)[1]

The primary motive for the reentry was to rescue the real property, comply

1. References to the Clerk's transcript of record will be designated "C.T." References to the reporter's transcript of the proceedings will be designated "R".

with state laws regulating deposit of trust funds (R. 28-29) and get NCB back into operation. (R. 27.) The seized personal property was not removed after petitioner effected his reentry. (R. 33-34.)

The agents were aware that their action could have the effect of permanently closing the company and destroying it. (R. 24.) They decided to lock the premises (not levied on) rather than move the seized personalty because the latter course would have been more difficult. (R. 22.)

By a letter dated January 14, 1977 petitioner sought reconsideration of the conviction in light of G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977). (C.T. 78.) The motion was denied. (C.T. 77-83.) The Court of Appeals affirmed the judgment and order. As stated in petitioner's accompanying Motion, which will not be repeated here, petitioner did not file a timely petition for certiorari, but asks the Court to consider this petition for the

reasons stated in the brief in support of the motion.

REASONS FOR GRANTING THE WRIT

The effect of the holding below is to confirm the constitutionality of unfettered discretion by government agents in effecting seizures of personal property, and deprivation of real property (not seized). Proof of the crime of which petitioner was convicted requires proof of a lawful prior seizure by the United States.[2] The lawfulness of that seizure was the only issue in this case.

The Court should grant the writ to determine the important constitutional issue raised. The Court's determination of the issue is necesary because in dicta the Court has endorsed the constitutionality of 26 U.S.C. § 6331 seizures despite lack

2. United States v. Harris, 521 F.2d 1089, 1092 (7th Cir. 1975); United States v. Page, 277 F.459 (W.D.Va. 1921); Cooper v. United States, 299 F.483 (3rd Cir. 1924); Cf. United States v. Heck, 499 F.2d 778, 783-4 n.5 (9th Cir. 1974).

of pre-seizure or post-seizure hearing. See, Phillips v. Commissioner, 283 U.S. 589 (1931); Fuentes v. Shevin, 407 U.S. 67, 92 (1972). The issue has not been directly raised in prior Supreme Court cases (in a non-jeopardy assessment setting). Moreover, the Court's dicta on this point conflicts in principle with its simultaneous holdings limiting prehearing seizure of property to circumstances presenting a special need for prompt action and after a prior determination by a responsible government official, under narrowly defined standards, that seizure is necessary and justified in the particular instance. Fuentes v. Shevin, 407 U.S. at 90-92. Only this Court may ameliorate the resulting confusion, exacerbated by the Court's recent holding in G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) to the effect that the Fourth Amendment does impose a warrant requirement for intrusive jeopardy seizures under 26 U.S.C. § 6331.

In Phillips v. Commissioner, 283 U.S. 589 (1931), petitioner was one of the stockholders of a dissolved, taxpayer corporation. The Commissioner had notified Phillips of a proposed assessment against him of unpaid taxes of the corporation, based on transferee liability. Phillips (by his executors) petitioned the Board of Tax Appeals for redetermination; the Board upheld the Commissioner, and the Second Circuit Court of Appeals sustained the order. The opinion does not indicate a levy against petitioner's property occurred. The Supreme Court rejected the petitioner's argument that summary administrative assessment of tax was unconstitutional (but was not required to review, specifically, procedures for levy based on such an assessment),

> "Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights. * * *"
> Phillips v. Commissioner, 283 U.S. at 595.

The Court's reasoning relied on adequate judicial safeguards and the fact that mere property rights, not liberty or life, was affected. Phillips v. Commissioner, 283 U.S. at 596.

The Phillips case was relied upon in this case (424 F.Supp. at 633), and is cited generally[3] as upholding the propriety of levy under 26 U.S.C. § 6331, as well as summary procedures for assessment.

So far as the language of the Phillips case can be read as justifying seizure (not involved in the facts of Phillips) prior to judicial review, it agreed with the established, contemporary views of prejudgment attachment by private creditors. See, Sniadach v. Family Finance Corp. of Bay View et al, 395 U.S. 337-346, 348-350 (Black, J., dissenting). In Sniadach v. Family Finance Corp. of Bay View et

3. See, e.g. United States v. Pilla, 550 F.2d 1085, 1092 (8th Cir. 1977) cert. den. 97 S.Ct. 2954 (1977).

al, supra, the Court held prejudgment wage garnishment to be violative of due process under the Fourteenth Amendment. The Court reached its view by striking a balance between "state or creditor interest" and the interests of the wage earner. 395 U.S. at 339. It is significant that the Court held "A procedural rule that may satisfy due process for attachments in general, see McKay v. McInnes, 279 U.S. 820, does not necessarily satisfy procedural due process in every case." Sniadach v. Family Finance Corp. of Bay View et al, 395 U.S. at 340. This suggested the need for elaboration in other prejudgment attachment settings. The significance of Sniadach is that it discredited the Phillips dichotomy between deprivation of liberty and deprivation of property. Fuentes v. Shevin, 407 U.S. at 88 discredited the dichotomy between wages and nonessential personal property; and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) dis-

credited the dichotomy between consumer's due process rights and those of business entities.

In Fuentes, the Court stated:

> "Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States [Phillips v. Commissioner, 283 U.S. 589] * * *." Fuentes v. Shevin, 407 U.S. at 90-92.

The citation to Phillips, in such a context, sows confusion which only this Court's intercession can remedy; for, as previously noted, Phillips did not involve a prejudgment seizure, or interference with actual enjoyment of property rights, but a

prejudgment assessment. Manifestly, 26 U.S.C. § 6331 does not meet the requirements described for summary seizure. Although, to be sure, collection of revenue is an "important governmental or general public interest" (Fuentes v. Shevin, 407 U.S. at 92), the federal statute does not "limit the summary seizure of goods to special situations demanding prompt action," and no neutral official "reviews the basis for the claim * * *" and "no * * * official evaluates the need for immediate seizure" and "there is not even a requirement that the plaintiff provide any information * * * on these matters." Fuentes v. Shevin, 407 U.S. at 93.

Mitchell v. W.T. Grant Company, 416 U.S. 600 (1974) may be viewed as suggesting some minimal requirements for prejudgment seizure, without notice or adversary hearing. There, the Court upheld Louisiana's sequestration statute, on the grounds that the latter allowed the writ only upon fac-

tual allegations in a sworn statement showing the nature and amount of the claim and passed upon by a judge. "Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end." 416 U.S. at 617. Seizure of property under 26 U.S.C. § 6331 is, of course, totally ungraced by the saving factors noted in W.T. Grant. Judicial oversight is absent to guard against mistake, excess or abuse. "The unsupervised mercy of" government "functionaries" (to borrow the Court's term) controls the process.

The Court's recent decisions suggest that 26 U.S.C. § 6331 seizures, as effected in the present, representative case, conflict with currently understood general due process standards. Nevertheless, the Court reiterates in dicta the constitutionality of the government's practices. The seeming exception can only be

based on unshakeable faith in the unsupervised wisdom and discretion of lower echelon federal officials. This exception turns the Fifth Amendment upside down, because it was precisely governmental oppression, not private unfairness, at which the Bill of Rights is directed.

In C.I.R. v. Shapiro, 424 U.S. 614 (1976) the Court recognized that the statutory procedures must be read with implicit, constitutional limitations. Unlike the present case, Shapiro was a jeopardy assessment case; and, also unlike the present case, it came up on the taxpayer's suit for an injunction against jeopardy assessment. Following Enochs v. Williams Packing Co., 370 U.S. 1 (1962) the Court held that the Constitution compels exception to the Anti-Injunction Act, 26 U.S.C. 7421(a) to permit injunctive relief against collection of any tax if it is clear the government cannot ultimately prevail, and the taxpayer would otherwise suffer irre-

parable injury. C.I.R. v. Shapiro, 424 U.S. at 628. The Court found the holding constitutionally compelled, referring to the developments relating to prejudgment attachments in the Sniadach and Fuentes line of cases:

> "This Court has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of pre-deprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made."
> C.I.R. v. Shapiro, 424 U.S. at 630.

The Court attempted to reconcile this statement with the doctrine associated with Phillips v. Commissioner, on the grounds that Phillips was not a jeopardy assessment case and thus "* * * the taxpayer's assets could not have been taken or frozen in that case until he either had, or waived his right to, a full and final adjudication of his tax liability before the Tax Court

* * *." C.I.R. v. Shapiro, 424 U.S. at 632. In so doing, the Court implicitly narrowed the effect of Phillips to cases in which the objection to the levy could have been raised in prior administrative proceedings.

This case presents a factual setting which exposes the inadequacy of the Shapiro defense of Phillips (even as limited). The crux of the problem is lack of distinction between an erroneous assessment of taxes, and an erroneous levy and seizure, following a proper assessment. This petitioner does not assert that the assessments of some eighteen hundred dollars of past due taxes were inaccurate. The pre-levy administrative procedures open to the taxpayer could only have determined the propriety of such assessments, which was not disputed. The levy, on the other hand, effected a deprivation far in excess of the assessments and involved expropriation of real property which was not legally seized.

There was no opportunity for pre-seizure inquiry into the basis for the actual deprivation of property, to assure that it was reasonable in method and proportional to the (valid) assessment. As to these issues, any taxpayer subject to levy is in precisely the same position as Shapiro: subjected to serious deprivation with no opportunity for pre-seizure or prompt post-seizure resolution of the basis for the deprivation (other than the accuracy of a tax assessment).

The Court has noted that due process in a particular instance can only be determined by a weighing of respective interests, and that in that balance the Government's interest in collection of taxes weighs heavily.

> "However, it is very doubtful that the need to collect the revenues is a sufficient reason to justify seizure causing irreparable injury without a prompt post-seizure inquiry of any kind into the Commissioner's basis for his claim." C.I.R. v. Shapiro, 424 U.S. at 631 n.12.

The Fuentes criteria for seizure without opportunity for prior hearing were:

(1) Direct necessity to secure an important Governmental or general public interest;

(2) Special need for prompt action;

(3) Requirement for a prior determination, by responsible, government official under narrowly drawn standards, that seizure was necessary and justified in the particular instance. Fuentes v. Shevin, 407 U.S. at 90-92 (emphasis added).

Granting the first two of these criteria, petitioner submits that the third is patently absent from 26 U.S.C. § 6331 seizure procedure. The rationale expressed in the cases discussed, from Sniadach to Shapiro, cannot be reconciled with the Court's continued suggestions that levy and seizure pursuant to 26 U.S.C. § 6331 pass constitutional muster. The oft-repeated general Government interest in tax collection con-

stitutes but one factor, insufficient in itself to justify summary seizures under the Fuentes analysis. Shapiro stands as recognition that in individual cases, despite that ever present general interest, the Government must be subject to check in its collection activities, because of the possibility of irreparable harm to a taxpayer on an unfounded levy.

The Shapiro case revolved around a positive showing, by the plaintiff, of irreparable harm should the Commission's action prove unfounded. That concept, while fitting in an invocation of equity jurisdiction of the Court, would be an anachronism in due process analysis. In the Fuentes case (followed in Di-Chem, Inc.) the Court disavowed its Sniadach suggestion of special status for the "necessities of life" in determining the minimal due process standards for prehearing deprivation of property. For precisely the same reason the Court should not stray into a sugges-

tion that the minimal due process accoutrements of tax levy vary from taxpayer to taxpayer according to "irreparable injury" threatened by excessive seizure in his particular case. Nevertheless, should the Court consider the irreparable injury question, the facts of this case established without contradiction that the closure of the National Credit Bureau offices did in fact threaten irreparable injury.

Petitioner does not contend that pre-seizure notice and adversary hearing is compelled. Rather, the minimal standards which petitioner suggests are appropriate are those spelled out in Fuentes and exemplified in W.T. Grant. It should be clear that the procedure is merely that assured under the Fourth Amendment prior to most searches and seizures. It is no novelty that the Fourth and Fifth Amendment should converge in such a situation. The Court has already noted the overlapping implications in G.M. Leasing Corp. v.

United States, 429 U.S. 338 (1977), which incorporated reliance on Shapiro and Fuentes:

> "These cases, of course, center upon the Due Process Clause rather than the Fourth Amendment, but the constitutional analysis is similar and yields a like result." G.M. Leasing Corp. v. Commissioner, 429 U.S. at 352 n. 18.

Likewise, the Fourth Amendment case of G.M. Leasing Corp. v. United States is suggestive guidance for the minimal requirements of due process preceding a valid seizure under 26 U.S.C. § 6331.[4]

---

4. The District Court held that petitioner had no standing to object to the introduction of evidence of the seizure because of any Fourth Amendment vulnerability. (C.T. 82.) (There was no determination that petitioner and the corporation were alteregos, as was the case in G.M. Leasing Corp..) That finding is however irrelevant. Ordinarily standing to object to Fourth Amendment infractions arises in the context of an argument that evidence obtained by such searches and seizures is inadmissible because of the larger interest in procedural fairness. Here, however, Fifth Amendment and Fourth Amendment problems stood in an entirely different light. The essential question was whether the seizure by the Government was an illegal seizure. If the Government (Cont.)

There, as here, the actions of IRS agents were instinct with interference with areas of privacy. The action of the agents here separated petitioner (co-owner of the corporation) from all documents contained in the corporate offices. The excessiveness of the seizure was a primary point of petitioner's contention of its illegality throughout the hearing below. (See, e.g. R. 27.)

Like the entry into G.M. Leasing Corp. offices, the entry of the IRS agents into NCB offices was not for purposes connected with NCB business. G.M. Leasing Corp. v. United States, 429 U.S. at 354. The agents in this case both entered the premises, and secured the building, although the real property was not seized.

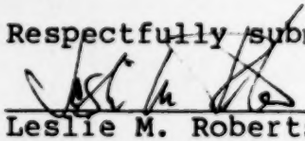
4. (Cont.) seizure were invalid then no crime was committed. The issue did not go to the mere question of the admission of evidence, but went in this particular setting to the substantive question of whether or not a crime had been committed.

The effect of this action was to give the federal agents exclusive access to the files and other papers of NCB, and to deny such access to NCB. The existence of the business itself was threatened, primarily by the sequestration of books and papers which could have no value upon sale to satisfy the tax debt. Therefore, effect of the seizure went far beyond any act reasonably necessary to secure the taxes due. The government offered no countervailing evidence that the extent of the intrusion and the unwarranted intrusion itself were justified. Under G.M. Leasing Corp., therefore, the search and seizure were illegal, in the absence of warrant.

Conclusion.

For the reasons stated this Court should grant the petition and issue the writ of certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,



Leslie M. Roberts
Of Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 77-3051

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STAMM F. JOHNSON,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF OREGON

ARGUED OCTOBER 12, 1978

Before: WRIGHT, VAN DUSEN* and GOODWIN,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions of defendant-appellant that the district court erred (See United States v. Johnson, 424 F. Supp. 631 (D.Or. 1976) and Supplemental Opinion of July 11, 1977 (D.Or. CR 75-265) by Judge Skopil) in concluding (A) the Fifth Amendment does not

* Senior Judge of United States Court of Appeals for Third Circuit, sitting by designation.

invalidate the summary seizure powers of the Internal Revenue Service as exercised under 26 U.S.C. § 6331 in the case,(a) (B) the Fourth Amendment required that the defendant be granted the opportunity of presenting additional evidence, the relevance of which was newly discovered after the United States Supreme Court decided G.M. Leasing Corp. v. United States, 429 U.S. 330 (1977), and (C) the January 14, 1977 letter application for a new trial was a timely motion for a new trial on the ground of after-discovered evidence,(c) it is

ADJUDGED AND ORDERED that the District Court Judgment of August 22, 1977 is affirmed.

FOOTNOTES

(a) The Fifth Amendment does not require "a presentment before a neutral judicial officer prior to the exercise of powers under" 28 U.S.C. § 6331. See Fuentes v. Shevin, 407 U.S. 67, 91-92 (1972); Phillips v. Commissioner, 283 U.S. 589, 595 (1931); Tavares v. United States, 491 F.2d 725 (9th Cir. 1974).

FOOTNOTES

(b) See United States v. Johnson, supra, opinions of 1976 and 1977.

(c) The trial court properly denied as untimely defendant-appellant's January 14, 1977 application for a new trial because it did not qualify as an application for a new trial on the basis of "newly discovered evidence" under the terms of F.R.Crim. P. 33. See United States v. Stamm F. Johnson, July 11, 1977, Supplemental Opinion of Judge Skopil at pages 4-5 (R80-81) (D. Or. CR 75-265); Hamling v. United States, 525 F.2d 758 (9th Cir. 1975).

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit on the counsel for respondent by enclosing three copies thereof in an envelope, postage prepaid, addressed to:

The Hon. Wade H. McCree
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Mr. Sidney I. Lezak
United States Attorney
P.O. Box 71
Portland, Oregon 97207

and depositing the same in the United States mails at Portland, Oregon, on February 6, 1979, and further certify that all parties required to be served have been served.

Leslie M. Roberts
Of Attorneys for Petitioner

Supreme Court, U. S.
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 424 F. Supp. 631. The opinion of the court of appeals (Pet. App. 26-28) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1978 (Pet. 1). The petition for a writ of certiorari was filed on February 9, 1979, together with a motion for leave to file it out of time and a brief in support of the motion. The petition is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service's warrantless levy upon property of petitioner's corporation for unpaid taxes by installing locks on the office entrances and

attaching warning notices on the windows invalidates petitioner's conviction under 26 U.S.C. 7212(b) for attempted forcible rescue of the property by removing the Service's locks and warning notices and installing new locks.

STATEMENT

After a nonjury trial in the United States District Court for the District of Oregon, petitioner was convicted of forcible rescue of property that had been seized by the Internal Revenue Service, in violation of 26 U.S.C. 7217(b) (424 F. Supp. 631-632). The trial court sentenced petitioner to a 30-day prison term (Mot. 11).[1] The court of appeals affirmed by judgment order (Pet. App. 26-28).

The pertinent facts were encompassed in stipulated testimony and exhibits and may be summarized as follows: In 1975, petitioner and his wife were the sole shareholders of National Credit Bureau, Inc. (NCB), a collection agency doing business in Portland, Oregon. Petitioner was a director and officer of NCB, but he did not take an active role in day-to-day management of the business. On April 4, 1975, Internal Revenue Service agents went to the business offices of NCB to collect assessed and unpaid taxes from the corporation. After being advised that NCB did not have sufficient funds with which to pay the taxes, the agents conducted an inventory of NCB's office. Pursuant to their authority under 26 U.S.C. 6331, the agents thereupon levied upon the corporation's business equipment, including desks and typewriters located on the business premises, by installing locks on the office entrances and attaching warning notices to the windows, which advised of the Service's seizure for nonpayment of taxes. The notices stated that

[1] "Mot." refers to petitioner's motion for leave to file the petition out of time.

"All persons are warned not to remove or tamper with the property, in any manner, under severe penalty of the law" (424 F. Supp. at 632 & n.1).

Petitioner learned of the levy late in the afternoon of April 4, a Friday. The next day he went to the NCB office and observed the warning notices and locks affixed by the Internal Revenue Service. He proceeded to remove the locks, gain entrance to the premises, and remove the notices. Petitioner thereafter engaged a locksmith to install new locks on the office. About ten days later, NCB paid its tax arrearages in full and the Internal Revenue Service released its levy (424 F. Supp. at 632).

In the district court, petitioner's brief stated: "Now charged with violation of 26 U.S.C. §7212(b), Mr. Johnson freely acknowledges that he violated the letter of that statute with full knowledge of the possible consequences" (footnote omitted). The district court accordingly found that petitioner made "repeated and voluntary admissions that he committed the acts alleged in the indictment * * *" (424 F. Supp. at 632).

ARGUMENT

1. The court of appeals correctly affirmed petitioner's conviction under 26 U.S.C. 7212(b) for forcible rescue of property subject to an Internal Revenue Service levy.

Petitioner first attacks (Pet. 8-25) the constitutionality of the levy procedures of 26 U.S.C. 6331 on the ground that they fail to provide for notice and adversary hearing prior to seizure, where the levy may effect "a deprivation far in excess of the assessments" (Pet. 18). But as the court of appeals observed (Pet. App. 27 n.(a)), this Court has consistently upheld the Treasury's summary seizure power to collect the revenue without a pre-seizure hearing as conforming with the requirements of procedural due process. See *Phillips* v. *Commissioner*, 283 U.S. 589 (1931); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 (1972). See

also *Tavares* v. *United States*, 491 F. 2d 725 (9th Cir. 1974), cert. denied, 420 U.S. 925 (1975); *United States* v. *Heck*, 499 F. 2d 778 (9th Cir.), cert. denied, 419 U.S. 1088 (1974); *United States* v. *Pilla*, 550 F. 2d 1085 (8th Cir.), cert. denied, 432 U.S. 907 (1977).[2] In *Commissioner* v. *Shapiro*, 424 U.S. 614, 630 n.12 (1976), the Court reaffirmed this proposition, stating that the need to collect the revenue justifies the government's summary seizure power without a pre-seizure hearing as long as the taxpayer has an opportunity for prompt post-seizure inquiry into the basis for the Commissioner's claim. See also *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 n.18 (1977).

2. Petitioner also contends (Pet. 25) that his conviction for forcible rescue of property is barred by this Court's decision in *G.M. Leasing Corp.* v. *United States, supra*. In petitioner's view, the agents' failure to obtain a search warrant prior to their levy upon NCB's property justified his removal of the locks and warning notices and the installation of new locks.

But *G.M. Leasing* does not involve comparable conduct and does not, in any event, speak to the validity of a conviction for forcible rescue of property. There, the Court held that the warrantless forcible entry by Internal Revenue Service agents into a corporation's office and removal of property for purposes of collection of taxes violated the Fourth Amendment. The Court therefore remanded the case for consideration of the corporation's claim to money damages against the individual agents in light of the government's assertion that the agents had acted in good faith. Here, on the other hand, the agents did not forcibly enter NCB's private premises or remove any property. They simply visited its offices during

[2]Contrary to petitioner's assertion (Pet. 8-14), this Court has upheld the validity of a pre-hearing seizure of property in satisfaction of an outstanding tax liability where collection of the tax is not in jeopardy. See *Springer* v. *United States*, 102 U.S. 586, 593-594 (1880).

normal business hours, and, after visually surveying the property, installed locks on the entrances and placed seizure notices on the windows. There is accordingly nothing in the record to suggest that any aspect of the agents' conduct constituted an invasion of privacy that would implicate the warrant requirement of the Fourth Amendment.

At all events, even if the agents should have obtained a warrant, their failure to do so did not justify petitioner's subsequent removal of the locks and seizure notices and his installation of new locks. Contrary to petitioner's contention, the courts have uniformly held that, in order to obtain a conviction for forcible rescue of property under 26 U.S.C. 7212(b), the government need only show that the property was seized by a person authorized to do so by virtue of his office. Thus, the defendant's appropriate course of action in response to a levy he believes is unlawful is not to repossess the property but to bring a civil proceeding attacking the seizure. See, *e.g.*, *United States* v. *Harris*, 521 F. 2d 1089, 1092 (7th Cir. 1975); *United States* v. *Oliver*, 421 F. 2d 1034, 1036-1037 (10th Cir. 1970); *United States* v. *Scolnick*, 392 F. 2d 320, 326 (3d Cir.), cert. denied, 392 U.S. 931 (1968); *United States* v. *Bernstein*, 287 F. Supp. 84, 86-87 (S.D. Fla. 1968). As the court stated in *United States* v. *Harris, supra*, 521 F. 2d at 1092, "[i]f the rule were otherwise it would 'encourage violent self-help where civil remedies are admittedly available' " (quoting *United States* v. *Scolnick, supra*, 392 F. 2d at 326).[3]

[3]Forcible rescue cases are analogous to prosecutions for assaults on federal officers. In those cases, the courts have uniformly rejected the proposition that a private individual may, by resisting, decide how federal officers—acting within the scope of their authority—should carry out their duties. See, *e.g.*, *United States* v. *Johnson*, 542 F. 2d 230 (5th Cir. 1976); *United States* v. *Cunningham*, 509 F. 2d 961, 963 (D.C. Cir. 1975); *United States* v. *Moore*, 483 F. 2d 1361, 1634-1365 (9th Cir. 1973); *United States* v. *Jansen*, 475 F. 2d 312, 318 (7th Cir.), cert. denied, 414 U.S. 826 (1973); *United States* v. *Ferrone*, 438 F. 2d 381, 389-390 (3d Cir.), cert. denied, 402 U.S. 1008 (1971).

Cooper v. *United States*, 299 F. 483 (3d Cir. 1924), upon which petitioner relies (Pet. 8), does not support his assertion that a person cannot be prosecuted for a forcible rescue of seized property if the seizure would be invalid under a subsequently announced standard. While *Cooper* states that "lawful seizure is not only an ingredient preliminary to an unlawful rescue but it is a prerequisite" and that "the lawfulness of the seizure must be shown" (299 F. at 484), the Third Circuit, citing its earlier decision in *Cooper*, subsequently observed that "[o]ne way for the Government to establish a lawful seizure is to show that the property was seized by a person authorized to do so by virtue of his office." *United States* v. *Scolnick, supra*, 392 F. 2d at 326. Here, petitioner cannot dispute that the revenue agents who installed the locks and attached the seizure notices to petitioner's property were fully authorized to do so. *G.M. Leasing* therefore does not bar petitioner's conviction for forcible rescue of property.[4]

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[4]Even on the assumption that a person cannot be prosecuted for a forcible rescue of property when the government's original entry and seizure is made without a search warrant as required by *G.M. Leasing*, petitioner's reliance on *G.M. Leasing* erroneously assumes that the decision in that case, which was rendered more than a year after the levy here, should be applied retroactively. But the privacy interests that the Court sought to uphold in *G.M. Leasing* would not be served by applying the decision retroactively to the instant case. See, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531, 535-536 (1975); *Desist* v. *United States*, 394 U.S. 244, 249-250 (1969); *Linkletter* v. *Walker*, 381 U.S. 618, 636-637 (1965); *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967). Here, the entry and seizure fully conformed to the longstanding prior Internal Revenue Service procedure under which a warrant was not thought to be required for entry on a taxpayer's premises for the purpose of seizing property to collect delinquent taxes. See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1855); see also *G.M. Leasing Corp.* v. *United States*, *supra*, 429 U.S. at 349-353; *United States* v. *Pilla*, *supra*, 550 F. 2d at 1091-1092.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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